JOINT APPENDIX OF THE PARTIES

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-342

FEDERAL POWER COMMISSION,

Petitioner,

—*v.*—

CONWAY CORPORATION, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED SEPTEMBER 2, 1975
CERTIORARI GRANTED NOVEMBER 11, 1975

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RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS—PROCEEDINGS
12-6-73	Petition for review of an order of the Federal Power Commission (m-6)
12-12-73	4-Motion of Arkansas Power and Light Company for leave to intervene (m-12)
1-14-74	Certified index to record (n-3)
3-12-74	25-Petitioner's printed brief
4-4-74	25-Intervenor's (Arkansas Power and Light Company) brief (m-4)
4-12-74	25-Respondent's printed brief (m-10)
4-26-74	25-Petitioner's reply brief (m-25)
5-3-74	10-Joint Appendix
5-23-74	Per Curiam order that the Clerk is directed to schedule this case for argument on the merits as promptly as the business of the Court permits; McGowan and Robb
8-27-74	Per Curiam order by the Clerk for the Court, that the motion for postponement of date set for oral argument is granted and the Clerk is directed to remove this case presently scheduled for argument on September 13, 1974 from the argument calendar and to reschedule it in the normal course of the business of his office
10-23-74	Argued before Tamm, Leventhal and MacKinnon, CJ
4-4-75	Opinion for the Court filed by Circuit Judge Leventhal

DATE	FILINGS—PROCEEDINGS

4-4-75 Judgment remanding case to the Federal Power Commission. (n)

4-23-75 4-Respondent's motion for stay of mandate (m-21)

5-1-75 Per Curiam order that the motion for stay of mandate is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment to June 25th; Tamm, Leventhal, and MacKinnon, CJ

6-23-75 4-FPC's motion to extend stay of mandate (m-23)

6-30-75 Letter from Supreme Court extending time to file certiorari to August 2, 1975

7-7-75 Per Curiam order that the respondent's motion to extend stay of mandate is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's Judgment to July 25th; Tamm, Leventhal, and MacKinnon, CJ

7-23-75 4-FPC's motion to extend stay of mandate (m-23)

8-5-75 Per Curiam order granting respondent's motion to extend stay of mandate to August 2; Tamm, Leventhal and MacKinnon, CJ

8-5-75 Notice from Supreme Court extending time to file petition for certiorari to September 1st

8-11-75 4-FPC's motion to extend stay of mandate to September 1st (m-7)

8-13-75 Per Curiam order directing the Clerk to stay the issuance of the certified copy of this Court's judgment to September 2nd; Tamm, Leventhal and MacKinnon, CJ

9-5-75 Notice of filing petition for writ of certiorari in S.C. No. 75-342 on September 2, 1975

DATE	FILINGS—PROCEEDINGS

11-18-75 Certified copy of Supreme Court order granting petition for writ of certiorari in S.C. #75-342 on November 11, 1975

11-20-75 Letter from Supreme Court stating that certiorari was granted on November 11, 1975 in S.C. No. 75-342 and requesting transmittal of record certified

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. E-8250

ARKANSAS POWER AND LIGHT COMPANY

PROTEST, MOTION TO REJECT, AND PETITION TO INTERVENE OF PUBLICALLY OWNED WHOLESALE CUSTOMERS

The undersigned nine city and cooperatively owned electric plants and departments hereby (i) protest the rate schedule amendments filed by the Arkansas Power and Light Company ("AP&L") on May 31, 1973; (ii) move the Commission to reject the proposed changes for the reasons hereinafter stated, and, without waiving any rights with respect to that motion; (iii) petition to intervene as a party in this matter if that filing is not rejected; and (iv) request the Commission to suspend the filing for five months if the filing is not rejected.

I

The names of the petitioners herein are the Conway Corporation (operators of the city owned electric system), Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc.

II

The names, titles and addresses of the persons to whom communications concerning this petition and motion should be addressed are:

Robert C. McDiarmid, Esquire
Sandra J. Strebel, Esquire
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Mr. James Brewer, Manager
Conway Corporation
Conway, Arkansas 72032

Mr. Wyatt Crawford, Superintendent
Benton Municipal Light and
Water Works
Benton, Arkansas 72015

Mr. Garland Medders
Hope Water & Light Commission
Hope, Arkansas 71801

Mayor Robert Rosamond
City of North Little Rock
North Little Rock, Arkansas 72114

Mayor Richard Pruitt
City of Osceola
Osceola, Arkansas 72370

Mayor Larry Wahlquist
City of Prescott
Prescott, Arkansas 71857

Mayor Tilden Rodgers
City of West Memphis
West Memphis, Arkansas 72301

Mr. Carl L. Cross, Manager
Farmers Electric
Cooperative Cooperation
Highway 67 North
Newport, Arkansas 72112

Mr. Dean Hodges, Manager
Mississippi County Electric
Cooperative, Inc.
510 North Broadway
Blytheville, Arkansas 72315

Inasmuch as this petition is filed jointly by nine publically owned entities, it is specifically requested that each of the above names be included on the official service list in this docket, in order to avoid the unnecessary duplication of filing nine petitions to intervene.

III

Petitioners here will, according to AP&L's filing, pay $13,981,539 in the year beginning August, 1973 out of the total wholesale revenues shown of $14,154,383.* According to AP&L's Statement N, the increase proposed to reach these rates is 22.6% for the cities and 34.9% for the cooperatives. Thus it is clear that the petitioners will be directly, and drastically, affected by the proposed change in rates, may be bound by the Commission's action in this proceeding, and that their interests cannot adequately be represented by other parties. Moreover, the municipal utilities here represented are regulatory bodies having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the meaning of Section 1.8(a) of the Commission's Rules of Practice and Procedure.

IV

Insofar as petitioners can ascertain, the sole reason which AP&L has for filing this unilateral rate increase is an attempt to squeeze petitioners or some of them out of competition, and to make them more susceptible to the persistent attempts of the company to take over the publically owned systems in the State. Even though the company has gone to great lengths to make its rate filing difficult to analyze, we shall demonstrate that, by using a standard cost of service analysis and a correct analysis of the revenues to be generated by the rates, AP&L is *already* recovering in excess of a fair rate of return, even under existing rates, without the 22.6 to 34.8% increase it is seeking.

* This should be compared with the revenues shown for the "test year" chosen by AP&L of $8,431,486 from both groups.

Arkansas, as this Commission is aware, is a state vigorously seeking new industry. Industry, and its accompanying payroll and other benefits, can be vitally important to a community in Arkansas, and petitioners, like AP&L, have sought actively to encourage new industrial load. Petitioners have generally sought to match AP&L tariffs for like loads, and have heretofore been able so to do while simultaneously returning to their citizen-consumers revenues sufficient to justify the ownership of the system. By virtue of their generally well-run systems and city administrators, petitioners have succeeded in attracting substantial increases in electrical load.

By this filing, AP&L seeks to force an end to the pre-existing competitive situation. While it here seeks to impose rate increases of 22.6% upon the cities and 34.9% upon the coops, it has indicated no intent of filing to change its own long-standing industrial rates. As will be shown, the proposed rates here are such that it would be impossible for petitioners to sell power to an industrial load of any size at a competitive price with AP&L, since, in many cases, the revenues therefrom would not even cover the incremental power costs to petitioners.

After being advised that AP&L intended to raise its wholesale rates, prior to their first contacts with the undersigned, and without advice of counsel, representatives of petitioners, relying on the representations of AP&L as to its costs, offered AP&L an agreement whereby petitioners would not oppose the wholesale rate filing if AP&L would agree to raise its industrial rates to maintain the historical comparative retail-wholesale competitive situation. AP&L declined this offer. Petitioners regard this as an indication of AP&L's purpose in increasing its rate to them unilaterally and alone.

The impact of the new rate filing upon the competitive situation in Arkansas may be outlined by a few calculations. For example, in the billing month of September, 1972, AP&L's billing comparison shows that West Memphis had a measured demand of 48160 kilowatts (corrected for 60 minute demand) and utilized 23116800

kilowatt hours of energy. Under the P-3 large industrial rate (appended as Attachment A) West Memphis could have purchased its energy (utilizing the actual 15 minute demand shown on its bill for that month from AP&L of 48,552 kilowatts) for $225,869.09. Under the existing U-3 rate, West Memphis actually paid $214,390.90 without discount.* Under the proposed U-3 rate as filed, West Memphis would pay $254,334 without discounts. Obviously, there is a drastic imbalance in the comparative rates introduced by this filing.

More importantly, even on an incremental basis, the proposed rate would make it impossible for petitioners to compete with AP&L for desirable industrial load. For example, a 10 megawatt industrial customer with an 80% load factor for the month ** could purchase power under the P-3 rate for $48,312 (for purposes of this comparison, all fuel clause revenues are excluded on all rates). Even if we assume that only 90% of that demand is registered at the time of a U-3 customer's peak,*** the purchased power cost alone for that load would be $47,450.**** Obviously, none of petitioners could sell for $48,412 energy which they purchased for $47,450 with any consideration of their own investment or their own expenses. Similarly, for the same 10 megawatt customer, with a 60% load factor, the total costs (again stated without fuel clause for either calculation) would be $42,984 under the P-3 rate while the purchased power cost to serve the customer (at 90% of demand on peak) would be $41,834 ***** for a U-3 customer under the proposed rate. The differential is simply not

* As developed *infra*, the discounts for plant credit and long term contracts are intended to compensate for other things.

** A brief examination of the characteristics of several of the industries in the area shows this assumption to be realistic.

*** A conservative assumption in light of the peak characteristics of these wholesale customers.

**** Including the cost of money adjustment.

***** Including the cost of money adjustment.

enough to support petitioners investment to serve their customers.

The differential is even more striking if 95% of the customer's demand is assumed to fall on peak. The cost for the same customer with 80% load factor would be $48,837 * or $425 more than the power could be sold for; and with a 60% load factor would be $43,222 ** or $238 more than the power could be sold for. If we consider a 15 megawatt customer, AP&L's purpose in filing these new rates becomes even more apparent. A 15 megawatt customer with 80% load factor can purchase from AP&L under the P-3 rate schedule for $69,218; with 60% load factor for $61,226. Even if we assume only 90% of that load is on peak, the purchased power costs alone under the proposed U-3 rate would be $71,-174.70 and $62,750.70, respectively, including cost of money adjustment. Under the present U-3 rate, a U-3 customer could purchase power for such a customer for $64,143 and $56,151 respectively.

In other words, for this desirable type of customer, for which petitioner would otherwise compete, what would otherwise have been a $5075 per month margin between the cost of purchased power and the amount for which it could be sold would be turned into $1956.70 (80% load factor) loss before consideration of return or expenses. For the 60% load factor customer, the $5075 per month margin would be turned into a $1063 loss before consideration of return or expenses.

Since the old U-3 and P-3 rates have had essentially the same load blocks (see Attachment A) and charge blocks, with the U-3 rate being cheaper for the first 8,000 kilowatts of load by $2,000 per month and the rates otherwise being essentially identical, there should be some explanation of why AP&L sees fit to change its comparative rate structure by filing only to increase

* Including cost of money adjustment at the average rate envisioned for the twelve months beginning August, 1973 in AP&L's filing.

** Including cost of money adjustment.

the rate of its competitors, which have historically been somewhat lower than its retail industrial rates.

The unexplained differentials and change in the historic relationship between wholesale and retail industrial rates shown above would, in itself, be cause for rejection, even if no more were shown. But the lack of cost basis to the filing may also be shown, even though the company seems to have gone out of its way to pick a stale, non-representative test year. Yet further, the company proposes here to alter the terms and conditions of its rates so as to impose an extremely onerous double recovery upon its wholesale customers; and to utilize automatically a tax adjustment clause that it long ago was told by this Commission it could not utilize without filing for a rate change when the clause was intended to operate * and to impose a cost of money escalation clause for which there is no more justification shown than an escalator clause tied to the results of the sixth race at Hialeah or any other game of chance.

V

Although one would imagine that AP&L must, by May 31, 1973, have had the figures as to its 1972 calendar year results available, the company has filed a split test year, ending on July 31, 1972. Ordinarily, of course, one would expect that any organization dealing regularly with this Commission would be sensitive to the frequently expressed concern that the figures upon which rates are based be as up-to-date as possible, *cf.* Docket R-463. The validity of the Commission's concern with recent data is demonstrated by the fact that, according to AP&L's billing data, as compared with the test year revenues shown in Statement N, the revenues from the municipal customers which AP&L has utilized for the test year were $7,929,648 while in the succeeding twelve months the like figure would be $10,405,301, and the same figures for the cooperatively owned customers were $501,838 and $702,835. The use of the split test year here adopted has several advantages

* The company has not bothered to advise the Commission of its earlier attempts in this regard.

to the company, however. For one thing, since it takes in the period comprising phase one of the President's economic stabilization program, it understates revenues to be ordinarily expected to the extent that the fuel clause would have risen to collect more revenues than it did under the freeze. To this extent, a revenue "deficiency" is created by the artful use of the test period. More important, however, the use of a split year of this sort makes the filing virtually impossible for the customers or the staff seriously to analyze prior to the time this Commission must act with respect to suspension, since the Forms 1 and 12 cannot be utilized as a check to ascertain what the company has done. This Commission has only recently required a utility which filed its proposed rate increase on April 10, 1973 (and thus may have had some justification for so doing) on the basis of an earlier test year to refile a new cost of service based on 1972 data. Order of June 14, 1973, *Gulf States Utilities Co.*, Docket No. E-8121. Inasmuch as there is no excuse here for the old test year, except to mislead and confuse this Commission and the customers, the use of this artificial test year is additional grounds for rejection here, and direction to the company to refile with a 1972 test year if it believes it can support a rate increase thereby.

VI

Although the company has so structured its test year so as to make comparison with Forms 1 and 12 difficult or impossible and its testimony so as carefully not to explain certain critical factors, certain of the factors utilized by the company in the construction of its cost of service are, at the very least, questionable, and the effect of the questionable factors upon the cost of service can be quantified now, without the substantial effort and discovery that many of the other factors may take to quantify. Thus, for example, the company has utilized a single peak allocation for its basic demand allocator, see Statements M, page 17 of 27, which appears basically (but not correctly) to be developed from the single coincident peak of the customers at the time of the company's peak load. The com-

pany justifies this on the basis of Mr. Homard's testimony (pp. 5-7) as to the relative importance of the company's summer and winter territorial loads. The difficulty with this analysis, even if it were otherwise valid, which it probably would not be for AP&L, is that AP&L is a member of the South Central Electric Companies group, which has a seasonal exchange with TVA, the net effect of which is dratistically to cut down the generation which AP&L must install to meet its summer peak, and to provide a ready market for substantial capacity during the winter trough of AP&L's territorial load. While it is unclear whether the company has correctly reflected the benefits of the seasonal exchange (or whether its integrated contract with the Middle South system is either operating fairly to AP&L's customers or correctly reflected), it certainly is clear that AP&L itself is not a proper candidate for a single peak allocation on the basis it argues.

If the actual territorial peaks are taken from AP&L's Form 12's for the respective months,* to develop the correct demand allocator on the basis of twelve months average peaks, and the remainder of AP&L's allocation factors are corrected to insert the new twelve month average peak allocation above,** the rate base allocated to municipals (Statement N, page 1 of 2) changes from $32,775,-789 to $28,194,948, and that for the cooperative group from $2,717,005 to $1,793,795. Moreover, because of the consequent change in each of the operating expenses other than "fuel and purchased power" resulting from the use of AP&L's allocation methods (save for the twelve month demand) the operating income *at present rates* allocated to municipals in Statement N (page 1 of 2) changes from $1,225,561 as shown by AP&L to $1,488,532, while the

* Although AP&L does set forth the coincident peaks of its wholesale customers, as required, in its filing Statements M, page 16 of 27, it does not give the total company peaks in the filing.

** Many of AP&L's other allocations are based, at least in part, upon its basic demand allocator. These have simply had the new, 12 month, demand allocator inserted in lieu of the single peak demand allocator.

like change for the cooperative group is from $(3,959) to $45,682.

The energy allocation is also faulty, but is more difficult accurately to quantify in the short time available to petitioners. For example, Statements M, pp. 9, 17, and 24 of 27 develop the figures for the energy allocator to the wholesale customers based upon certain assignments and assumptions as to the energy wheeled during diversity exchange and to certain customers. If these assignments and assumptions are reversed, and the allocations are made upon a more typical basis of book dollars and book megawatt hours, the energy allocators to the customers would drop substantially, and the net effect on Statement N would be beneficial to the customers. Specifically, the Statement N figures as to operating income would be increased, at *present rates*, for the cities by $147,953, and for the cooperative group by $11,635.

VII

The *pro forma* nuclear adjustment made by AP&L is entirely without merit. In the first place, of course, what AP&L proposes is an adjustment to put, however crudely, its nuclear plant in the rate base while continuing to book interest during construction, since it does not anticipate putting the nuclear plant into service prior to spring, 1974. See testimony of Mr. Ritchie, page 8. Thus, if not rejected or suspended for the maximum five month period, the company will earn on the basis of costs and expenses it has never incurred for a substantial period, even if the on-line date now estimated is met. In the second place, as a result of the operation of the Middle South system, the method of proration used by the company (Statement L, pp. 3, 4 of 4) is almost certainly severely inaccurate. Aside from the fact that the revenue deduction shown on line 4, page 3 of 4 is over-stated by some $300,000 because of the company's use of 2.8 mills in the fuel clause base (footnote 4) rather than the 2.862 mills in the actual base (see existing and filed rates U-3, B-1) there is little or no chance that a nuclear plant would be operated to produce the same kilowatt hours as 850 mega-

watts of fossil generation taken evenly across the company's fossil generation mix, because it, like all other generation on the system, would be operated to provide power most efficiently for the Middle South system as a whole.

Moreover, there is no reason to assume that (1) the unit will be down for refueling nine months after it begins operation (Statement L, page 404) or that (2) it will ordinarily operate at only 600 megawatts of its 850 megawatt capacity when it runs (*ibid*). For each of these reasons, and both of them, the nuclear *pro forma* adjustment proposal should be rejected out of hand.

VIII

Perhaps most important, AP&L is apparently seeking, by sleight of hand, to use this Commission to its own end of completing a cycle by which it turns a valuable concession, given during arms' length negotiations in return for a result immensely valuable to AP&L and its shareholders, into a mess of pottage. Over the years, petitioners, and others, have from time to time built generation of their own, and discussed alternative bulk power supply among themselves and with others. These discussions reached a head in the mid-1960's, and in a series of negotiations with AP&L, petitioners, individually, hammered out long-term supply contracts with AP&L. Petitioners, in these contracts, agreed not to purchase such capacity from others and to limit plant credit to existing capacity of their own; AP&L, in return for these immensely valuable concessions, has agreed to seek 10% less from the petitioners than it would otherwise be entitled to.* Until now, AP&L has stuck by its agreement. With the present filing, now that all the petitioners are tied by the long-term contracts for which AP&L guaranteed a discount, however, AP&L seeks a fair rate of return based

* The discount arragenment for the cooperative group is similar, but differently phrased. The Conway Corporation is presently operating on a 5% direct discount and an additional 5% is being escrowed by AP&L, apparently without passing through its income accounts. See Form 1, page 225.

upon a deficiency apparently calculated on the basis of its book *net* income, after discount. The effect of this is to eliminate the benefit petitioners get from the discount, since the rate, *after* discount, will beset at what the Commission finds to be fair and reasonable, if AP&L's method is followed. Thus the rate for those systems without a long-term contract, if any, would be substantially in excess of a fair and reasonable rate. If AP&L can pull this cloak over the Commission's eyes and obtain from petitioners the precise same rate after discount that it would have gotten if petitioners had not signed the long-term full requirements contract, then this Commission will truly have traded petitioners' birthright, see *Gulf States Utilities Co.* v. *FPC*, US —, 41 USLW 4637 (1973) for a mess of pottage.

Obviously, since AP&L and petitioners have agreed on the value of the long-term feature of the contract to AP&L's shareholders, the discount should be given effect as it is set forth in the contract. Thus, the book revenues which AP&L utilizes in its Statement N (line 2) should be corrected, since all AP&L is entitled to is a fair return on its undiscounted rate. Thus the revenues of $7,929,648 and $501,838 which AP&L shows for the cities and cooperative group, respectively, should be corrected to the pre-discount revenues of $8,810,720 and $557,597, respectively.* After adjustment for tax effect, this would mean an addition to net earnings (Statement N, line 16) of $430,638 for the cities and $27,255 for the cooperative group *under present rates.*

IX

The Company here attempts to introduce a cost of money escalation clause into its rates. There is no attempt whatever to justify or even to rationalize the clause; while the Company has filed a Statement O (which does not meet the filing requirements of Section 35.13 of the Commission's Rules and Regulations) there is nothing which

* For convenience, the 10% figure is used for the cooperative group also, as being approximately correct. The exact figure varies with the customer's load factor.

purports to relate the cost of money escalation clause to anything more than wishful thinking.

The Company also proposes to apply to the Cities (but not to the Cooperative group) a tax adjustment clause, which it apparently expects to operate automatically. It fails to note that by letter of September 12, 1965, sent by direction of this Commission, the Secretary advised AP&L that:

> It is noted that in addition to providing a presently effective schedule of rates and charges, rate schedule supplements for service to municipal and private utilities as designated in the Attachment provide for future adjustment in billing due to changes in taxes and the Gross Receipts Tax of the State of Arkansas. The invocation of these adjustments will constitute a change in rates within the meaning of Section 205(b) of the Federal Power Act and Sections 35.1(c) and 35.13 of the Commission's Regulations thereunder and therefore shall be preceded by appropriate supplemental schedule filings.

No less should be required today. These escalation clauses plainly do not meet the justification for escalation factors set out in this Commission's Opinion 633, *New England Power Company*, — FPC — (Docket No. E-7541, October 30, 1972), and thus should be rejected altogether, but in any event, they should not be allowed to operate automatically.

X

AP&L proposes an "additional facilities charge" in it's proposed rate schedule whereby it proposes to charge wholesale customers, for the installation of any additional transmission or distribution facilities (other than transformation or substation facilities), a charge of 1.3% of the original installed cost of such additional facilities per month. Several of the petitioners expect to be in need of such facilities in the near future, as the result of growing loads. Since 1.3% per month is equal to 15.6% per year, this means that in 6.41 years, a wholesale customer would pay to AP&L the extra cost of new transmission or distribution lines to serve it, just in the "additional facilities charge".* Of course, since the facilities would be required to serve growing loads, the customer would also have paid AP&L the whole cost of service for all such facilities in the basic rate. Thus AP&L seeks to recover from the petitioners twice for all future line extensions. This approach is unfair on its face, and it further indicates that AP&L intends to attempt to squeeze petitioners out of competition.

XI

The Company, by this filing, has increased its ratchet from 70% to 75%. This is totally unjustified on the basis of the filing, and imposes a substantial burden upon petitioners for several months of each year. Moreover, since the Company utilizes a 70% ratchet for its industrial load, it is a further device utilized to institute a price squeeze.

XII

An officer of a sister member of the Middle South system once aptly testified, as to analogous matters, that "the exact cost will probably never be known because the disbursements are so well scattered throughout the records until I doubt it would be possible to get them all together and thus ascertain the true cost . . ." Testimony of J.D. Stietenroth, Hearings Before a Subcommittee of the Committee of the Judiciary, United States Senate, 83rd Congress, 2nd Session, Investigation Concerning the Charges of Monopolistic Influences in the Power Industry, Part II, September 28, 1954. Petitioners, in the 27 days since the filing of this schedule, has not been able to determine the dollar effect of numerous items which appear to warrant investigation. These include, but are limited to:

(a) The mode of operation of the Middle South system, and its fairness to the customers of AP&L as reflected through AP&L's books.

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* $500,000 in new facilities to serve increased load would require a payment of $78,000 per year under this clause alone.

(b) The correct reflection of savings from the seasonal diversity exchanges in which AP&L engages.
(c) The transactions with the Southwest Power Administration, from which AP&L appears to get power which should belong or be allocated to petitioners.
(d) The propriety of the rate design

XIII

The revenues which AP&L is utilizing to determine its "deficiency" are not only not corrected to eliminate the effect of the long-term discount, but are also not corrected to reflect plant credit correctly. AP&L has determined that it will pay petitioners *not* to run their existing generation, through the plant credit rider. As can be seen from the billing comparisons, this credit to petitioners amounts to $221,123 per year. Since AP&L, as a part of its contractual relations with petitioners, has sought to induce them not to run their generation by the use of this clause, for its own benefit, it is plainly improper to calculate the "deficiency" in such a fashion as to charge them directly the same amount paid out for this purpose. When corrected for tax effect, this factor will increase the Statement N operating income for the cities by $108,085.

XIV

As we have shown, there are substantial irregularities in the AP&L filing, and that filing should be rejected as a result of the obvious price squeeze which AP&L has sought to impose without cost basis therefore. As can be seen from Attachment B, hereto, Middle South Utilities, AP&L's corporate parent, has increased its consolidated net income by 24% in the twelve months ended May 31, 1973 over the previous twelve months. Consequently, it is apparent that a rejection with directions to AP&L to justify a rate increase on the basis of a more recent test year, if it can do so on a more normal basis, would scarcely injure either AP&L or Middle

South and its shareholders. If relevant, however, it should also be pointed out that making but three of the corrections here discussed—for the twelve month average peak demand allocation and gross rather than net billings for purposes of the revenue estimates (correcting both for long-term discounts and for plant credit) would completely wipe out the company's justification for a rate increase, without consideration of the numerous other factors herein discussed. If these corrections *alone* are made, then the existing rate of return for both cities and cooperatively owned systems is shown to be well in excess (7.19% and 4.06% respectively) of that which the company claims to want as a result of this filing (6.415% and 3.002%; see Statement G) and the rate *now* returns 10.29% on equity. If the proposed rates, rather than the present rates, are utilized in the calculation, the overall rate of return which would be shown would be 10.30% for the cities and 8.83% for the cooperatively owned group, for an overall rate of return from all wholesale business of 10.21%. Based on the company's Statement G, and Doctor Langum's testimony as to embedded debt costs and ratios, this would equate to a return on equity for the city business of 21.26%, for the cooperative business of 16.19%, and for the overall wholesale business of 20.65%. Heretofore, to the knowledge of the undersigned, no electric public utility has yet had the gall to even request such a rate from this Commission.

CONCLUSION

For the above stated reasons, and since the company has filed a plainly discriminatory rate against the single class of customer which it has historically attempted to drive out of business, without justification on any ordinary cost of service basis, the filing should be rejected out of hand, with leave for the company to file again a) if and when it files to increase its retail industrial rates, and b) if and when it can justify an increase to the wholesale customers on a single year recent "test year". Without waiving any rights under the foregoing motion,

petitioners should be admitted as full parties to this case in any event, and if the motion to reject is not granted, then the rate should be suspended for the maximum five month period envisioned by the Federal Power Act and consonant with the President's economic stabilization program.

Respectfully submitted,

/s/ Robert C. McDiarmid
ROBERT C. MCDIARMID
Attorney for the Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas

June 28, 1973

Law Offices of:

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

VERIFICATION

DISTRICT OF COLUMBIA, ss:

Robert C. McDiarmid, first being duly placed upon affirmation, deposes and says that he is an attorney for the Conway Corporation. Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas; and that as such he has signed the foregoing Protest, Motion to Reject, and Petition to Intervene of Publically Owned Wholesale Customers for and on behalf of said parties; that he is authorized by the Cities and Cooperatives so to do; that he has read said Protest and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information or belief.

/s/ Robert C. McDiarmid
ROBERT C. MCDIARMID

Subscribed and affirmed to before me this 28th day of June, 1973.

/s/ [Illegible]
Notary Public

My Commission expires September 30, 1974.

ATTACHMENT A

ARKANSAS POWER & LIGHT COMPANY

ELECTRIC RATE SCHEDULE

Issued by O. V. Holeman, Director of Rates & Research

ARKANSAS PUBLIC SERVICE COMMISSION

Received: July 9, 1965

Approved: July 9, 1965

Authority: Docket No. U-1901

LARGE POWER SERVICE RATE SCHEDULE P3

Effective July 9, 1965—Page 1 of 2

Supersedes Schedule No. 14-A, Effective 3-18-63
Superseded by Schedule No. ——— Effective ———

AVAILABILITY

At a point on existing facilities having adequate capacity and suitable voltage for delivery of service from the Company's interconnected transmission system.

APPLICATION

To all electric service, including incidental lighting, required by Customer on the premises, when supplied at one point of delivery and measured through one kilowatt hour meter.

Applicable to standby or supplementary service and to interruptible service only in conjunction with the applicable Rider for such service.

Not applicable to temporary, breakdown, resale or shared service.

CHARACTER OF SERVICE

Three phase, 60 cycles and at one standard delivery voltage required by Customer and available at Customer's service location.

NET MONTHLY RATE

$3,085.00 for the first 1,100 Kw or less of Load
$2.35 per Kw for the next 6,900 Kw of Load
$1.60 per Kw for all additional Kw of Load
0.495c per Kwh for the first 360 Kwh per Kw of Load
0.370c per Kwh for all additional Kwh

Minimum

The Load Charge for the current month, but not less than $3,085.00 monthly.

Adjustments

1. Taxes. The above rate shall be subject to an increase or decrease in proportion to the amount of new taxes or increased taxes which the Company may hereafter have to pay, which are levied or imposed, or increased, or decreased by laws or ordinances which are not in effect on July 1, 1965, provided, however, that this Adjustment shall only be applied when authorized by order of the Arkansas Public Service Commission.

2. Fuel. The above energy charge(s) will be increased or decreased one-thousandth (.001) mill per Kwh for each one-thousandth (.001) mill per Kwh by which the weighted average cost of fuel, adjusted for losses, burned in the Company's fossil fuel burning generating stations during the second preceding calendar month for the supply of service hereunder exceeds or is less than the following amounts per Kwh delivered to Customer.

   (a) For delivery at nominal voltages of 13,800 or higher: 2.862 Mills
   (b) For delivery at nominal voltages of less than 13,800: 2.938 Mills

3. Customer may elect to take service at primary voltage that is available or, in Company's judgment, can be made available in the most practicable manner. When Customer contracts to take service at such primary voltage and provides all facilities necessary to take service at this Voltage, the Load Charge, before adjustments, will be reduced 15c per Kw for nominal delivery voltage of 13,800 or above.

The highest load established during the month, as shown by or computed from the readings of Company's demand meter, for the 15 minute period of Customer's greatest use during the month. Loads established during the billing months of October through May will be reduced by 50% of their excess over the average of the four loads billed during the preceding billing months of June, July, August and September, provided Customer received service during the preceding months of June, July, August and September. However, the billing load for any month shall not be less than 1,100 Kw nor less than 70% of the highest load billed during the 12 months ending with the current month.

If the power factor at the point of measurement is found to be less than 85%, load measurement may also be made by Kva demand meter, in which case one Kva as registered will be considered as 0.85 Kw but not less than the actual Kw.

PAYMENT

Bills are due and payable each month upon presentation.

CONTRACT PERIOD

Not less than five years.

SERVICE REGULATIONS

Service under this schedule is subject to the Service Regulations of the Company as they are now on file, and as they may in the future be filed, with the Arkansas Public Service Commission, State of Arkansas.

ATTACHMENT B

Ark. Gazette Sunday, June 24, 1973

UTILITIES SHOW 24 PER CENT INCOME GAIN

Consolidated net income of $85,799,000 was earned by the Middle South Utilities System during the 12 months ended May 31, an increase of 24 per cent over the $68,-969,000 earned during the 12 months ended May 31, 1972, the system said Saturday.

Earnings per share on average number of shares outstanding amounted to $2.09 compared with $1.73 during the previous period, on a smaller number of shares outstanding.

For the five months ended May 1973, the System's consolidated net income was $27,035,000, compared with $21,007,000 during the same period of 1972. Earnings per share for the period were 64 cents, as compared with 52 cents for the same period in 1972.

Total operating revenues for the 12 months ended May 31 were $624,373,000, up 16.8 per cent from a year earlier. Electric operating revenues during this period increased 16.5 per cent to $575,566,000.

Middle South's major companies are Arkansas Power and Light Company, Arkansas-Missouri Power Company, Louisiana Power and Light Company, Mississippi Power and Light Company and New Orleans Public Service, Inc.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. E-8250

ARKANSAS POWER & LIGHT COMPANY

RESPONSE OF ARKANSAS POWER & LIGHT COMPANY TO MOTION OF PUBLICALLY OWNED WHOLESALE CUSTOMERS

Comes now Arkansas Power & Light Company (AP&L) in opposition to the "Protest, Motion to Reject and Petition to Intervene of Publically Owned Wholesale Customers" (Customers), filed June 28, 1973, as supplemented by "Motion for Leave to Substitute and Add," filed July 2, 1973, in the above-referenced case. In support of its opposition, AP&L states as follows:

1. On June 1, 1973, AP&L filed with the Commission in the above docket an Application for Increase in Electric Rates applicable to its various municipal and rural electric cooperative customers. This application was opposed by nine of the Company's wholesale customers by the Customers' June 28, 1973 motion, as supplemented by their July 2 "Motion for Leave to Substitute and Add."

2. Customers' motion to reject is without merit. Section 35.5 of the Commission's Regulations under the Federal Power Act specifically states that a filing is to be rejected if it "patently fails to substantially comply" with applicable requirements. Customers' motion does not in any way show that the Company's filing fails to substantially comply with the Commission's requirements.

3. The issues raised by the Customers in their motion are not grounds for a motion to reject. Even if the mathematical calculations which Customers assert should have been made are correct—a point which the Company strongly denies—the issues raised merely indicate the appropriateness of a hearing so that all parties will have an opportunity to support their positions.

4. The very essence of a hearing in proceedings of this type is to determine the justness and reasonableness of the proposed rates. The Company has supported the rates it is proposing by filing detailed Statements A through P, as required by § 35.13 of the Commission's regulations, and presenting the testimony of six witnesses on its behalf. Customers, on the other hand, through their counsel have done no more than make a series of completely unsubstantiated charges that totally lack supporting data. If the Customers believe that the issues they raise have merit, they should file testimony and exhibits substantiating their claims. Once they have done so, the Company will be able to respond through the submission of rebuttal evidence. Pending the submission of Customers' testimony and exhibits, AP&L will attempt here to briefly discuss some of the contentions made by Customers in their motions and will show that Customers' assertions are greatly exaggerated or without foundation. The Company does not admit that there is any validity to any issues raised by Customers which are not discussed below and will respond more fully to Customers' assertions at the proper time after Customers have filed their supporting testimony and exhibits.

5. Customers state (Motion, p. 3) that "[a]ccording to AP&L's Statement N, the increase proposed to reach these rates is 22.6% for the cities and 34.9% for the cooperatives." This statement is typical of the way in which Customers have attempted to misconstrue AP&L's filing. During the year beginning August 1973, the Company would receive $11,809,323.23 from its wholesale customers under its presently effective rates. This figure, not the $8,431,486 test year revenues, must be used to determine the percentage increases under the proposed rates for the year beginning August 1973. Thus, the percentage increase to the municipal customers is 19.4% and that to the cooperatives is 27.2%, not the inflated figures cited by Customers.

6. Customers' assertions that the Company is attempting to "squeeze them out of competition" (Motion, p. 4) through the proposed rates and that Customers will be

unable to competitively sell power to industrial loads (Motion, p. 6) are completely fallacious and most vigorously denied by AP&L.

The Company will prove at the hearing, assuming that the issue is appropriately raised and supported on the record by material beyond undocumented allegations of Customers' counsel, that Customers will be able under the proposed rates to purchase power from the Company to serve any industrial customer with a realistic load factor that they may reasonably expect to attract, construct the necessary facilities at today's prices, and realize a return on their investment.

Customers' example of prospective industrial customers of 10 megawatts with 80% and 60% load factors and a 15 megawatt customer with an 80% load factor are likewise grossly inaccurate. Despite the fact that the municipal customers have been paying an extremely favorable rate for service from AP&L, not one of them has now, or ever has had, a customer with a 10 or 15 megawatt load.

7. The Company's use of a test period ending July 31, 1972, is not a basis for rejecting the Company's filing, nor was the use thereof designed in any way to confuse the parties to this proceeding. The Commission has accepted filings employing a mid-year test period in other proceedings, *e.g.*, *Duke Power Company*, Docket No. E-7994. In several recent proceedings, the Commission has accepted the company's filing and has then required it to file a cost of service presentation using a different test period. *Gulf States Utilities*, Docket No. E-8121; *Toledo Edison Company*, Docket No. E-7929; *Florida Power & Light Company*, Docket No. E-8008; *South Carolina Electric & Gas Company*, Docket No. E-8052. The Commission did not reject any of the cited filings, and it should not reject AP&L's filing because of the test year employed. Further, the use of a more recent test period in this proceeding will simply show an even lower rate of return to the Company under the present rates due to additions to plant, increased expenses, and higher peak demands and energy consumptions.

Customers' further assertion that the Company's test year is advantageous to AP&L since it understates revenues from the fuel clause due to Phase I of the President's economic stabilization program (Motion, p. 10) is erroneous. Phase I affected billing under the Company's fuel adjustment clause only during the month of September, 1971.

8. The Company's use of the peak responsibility method for allocating demand is completely proper, despite Customers' allegations to the contrary (Motion, p. 12), as the Company will establish at the hearing, assuming that the issue is appropriately raised and supported on the record by material beyond undocumented allegations by Customers' counsel.

9. AP&L denies that its *pro forma* nuclear adjustment is "without merit" (Motion, p. 14). The Company's Arkansas Nuclear One unit will be in service during the first twelve months after the proposed effective date of this rate increase. The adjustments made by the Company were designed to show the different costs that the Company can reasonably expect to incur by the use of this nuclear unit and are fully supported in AP&L's filing.

10. Customers state that "AP&L, in return for these immensely valuable concessions, has agreed to seek 10% less from the petitioners than it would otherwise be entitled to" (Motion, p. 17). The contracts between AP&L and these customers allow the customers to receive up to a 10% discount from the rate in effect at the time the contracts were executed. These discounts, which vary according to the duration of the contracts, were derived in recognition of the fact that the facilities installed by the Company to serve the Customers would be idled while still having a substantial useful life remaining if the contracts are terminated early. Customers' loads are growing and long-range planning is necessary for both Customers and AP&L in planning the necessary facilities for serving these loads. Further, Customers' Motion ignores the fact that the contracts with certain of the Customers allow them to cancel the contracts in advance of the expiration of their 20-year term, particularly if the rates and charges are increased.

11. At page 19 of their Motion, Customers discuss the Company's proposed cost of money adjustment clause and the proposed tax adjustment clause. It is interesting to note that, although Customers argue against the cost of money adjustment, nowhere do they urge that the proposed adjustment is excessive. Indeed, it is a legitimate cost of service, for when the cost of money increases so does the cost of service.

The Company's proposed tax adjustment clause does apply to the municipal customers and not to the cooperative customers, as Customers state (Motion, p. 19). What Customers fail to state is the fact that the municipalities have the power to tax, whereas the cooperatives do not. Any tax that the municipalities may levy on the Company's operations or facilities used to serve the needs of that municipality increases the cost of service and should be passed on to the particular city levying the tax and should not be borne by other customers.

12. Customers allege that the proposed facilities charge would mean that the customer will pay AP&L the extra cost of the new facilities in 6.41 years (Motion, p. 20). This allegation totally ignores the fact that when the Company installs additional facilities, it incurs a variety of additional expenses, *e.g.*, additional *ad valorem* taxes, interest on bonds and preferred stock dividends, and additional operation and maintenance expenses connected with the new facilities. Customers also ignore the fact that they have the option of installing the new facilities themselves if they so choose.

13. In comparing the existing 70% ratchet to the Company's proposed 75% ratchet (Motion, p. 21), Customers fail to state that the existing Rate Schedule P3 is based on a 15-minute demand, while the proposed Rate Schedule U3 is based on a 60-minute simultaneous demand.

14. Customers assert that AP&L has paid them not to run their existing generation, through the use of the Plant Credit Rider (Motion, p. 23). The contracts entered into between AP&L and Customers do not prohibit Customers from operating their existing generation. Two of the customers (Conway Corporation and The City of

Benton, Arkansas) do operate their own generation. The Plant Rider Credit was designed to let Customers operate their generating equipment during the peak load season. Operation in this manner would reduce the billing demand to the customer during the months when the generation was operated and minimized the effect of the ratchet in existing Rate Schedule U3. The customers can shut down their generation during the light load season, and the Company would sell more off-peak energy to these customers.

15. The Company recognizes that Customers have a substantial interest in this proceeding and does not oppose their intervention herein.

16. As shown in AP&L's filing of June 1, 1973, the Company is only earning a rate of return of 3.739% from service to its municipally-owned and privately-owned wholesale customers. The Company is experiencing a negative rate of return of .146% from service to its rural electric cooperative wholesale customers. These extremely low rates of return demonstrate the Company's need for the rate increase proposed herein. The Commission has discretion over suspension of filed rate increases. *Municipal Light Boards of Reading and Wakefield, Mass* v. *FPC*, 450 F.2d 1341 (1971). AP&L urges that given the low rates of return it is currently experiencing from its wholesale classes of service, a one day suspension is fully justified. Customers will be fully protected by the rates being in effect subject to refund. However, if the rates are suspended for five months, as proposed by Customers, the Company will have to permanently forego those revenues that its filing shows are needed and justified.

WHEREFORE, for the foregoing reasons, AP&L respectfully submits that the Customers' motion to reject be denied as being without merit.

Respectfully submitted,

ARKANSAS POWER & LIGHT COMPANY

By /s/ Robert T. Hall, III
HARRY A. POTH, JR.
ROBERT T. HALL, III
REID & PRIEST
1701 K Street, N. W.
Washington, D. C. 20006

Attorneys for
Arkansas Power & Light Company

Edward B. Dillon, Jr.
Robert M. McHenry, Jr.
House, Holmes & Jewell
Tower Building
Little Rock, Arkansas 72201

VERIFICATION

DISTRICT OF COLUMBIA) ss:

Robert T. Hall, III being first duly sworn, deposes and says that he is attorney for Arkansas Power & Light Company; that he has been duly authorized to execute, verify and file with the Federal Power Commission the foregoing document; that he has read the contents of same and that the statements contained therein are true and correct to his best information, knowledge and belief.

/s/ Robert T. Hall, III
ROBERT T. HALL, III

Subscribed and sworn to before me this 20th day of July, 1973.

/s/ Lee S. Sherline
LEE S. SHERLINE
Notary Public

My Commission Expires Nov. 14, 1973

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of § 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D.C. this 23rd day of July, 1973.

/s/ Robert T. Hall, III
ROBERT T. HALL, III

Of Counsel For
Arkansas Power & Light Company

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

ARKANSAS POWER AND LIGHT COMPANY

Docket Nos. E-8250
E-8071
E-8142

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF SHEETS, DENYING MOTION TO REJECT, CONSOLIDATING PROCEEDINGS, ESTABLISHING HEARING PROCEDURES, INITIATING PROCEEDING UNDER SECTION 206 OF THE FEDERAL POWER ACT, AND PERMITTING INTERVENTION

(Issued July 31, 1973)

On June 1, 1973, Arkansas Power and Light Company (APLC) tendered for filing proposed changes in its Rate Schedule U3—Resale Service to Municipally Owned and Privately Owned Electrical Distribution Systems [1] and its proposed changes would increase APLC's revenues from sales and service by $1,969,462 for the twelve month period ending July 31, 1972. The proposed effective date is August 1, 1973. (FPC Rate Designations are shown in Appendix A)

APLC states that no facilities will be installed or modified except to accommodate additional capacity and/or to

[1] Benton Municipal Light and Water Works, Water and Light Commission of Hope, City of North Little Rock Arkansas, City of Osceola, Arkansas, City of Prescott, Arkansas, City of West Memphis, Arkansas, Citizens Light & Power.

[2] Conway Corporation, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative Inc., North Arkansas Electric Cooperative.

provide points of delivery for customers' load growth in the future. Furthermore, APLC states that the Company does not propose to apply the 1.3% monthly additional facilities charge provided for in the new rate schedules to any presently installed transmission and distribution facilities. Finally, APLC states that the rate of return from service to the municipally owned and privately owned systems is 3.74% and from service to rural electric cooperatives the rate of return is a negative .15%.

The Company states that the proposed rates will enable the Company to improve its rate of return, which it believes is vital to attract the necessary amount of capital in order to provide adequate service to its present and future customers.

Notice of filing was issued on June 15, 1973, with protests and petitions to intervene due on or before June 28, 1973. A Protest, Motion to Reject, and Petitions to Intervene of Publicly Owned Wholesale Customers [1] (Customers) was timely filed June 28, 1973. In support of its motion to reject, Customers first allege that APLC's participates in anti-competitive activity and that the proposed rate increase would "squeeze" Customers out of competition with respect to sales to industrial customers.

By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anti-competitive issues. These standards are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anti-competitive activities. This action is without prejudice to Customers' right

[1] Conway Corporation, Benton Municipal Light & Water Works, Hope Water & Light Commission, City of North Little Rock, Arkansas, City of Osceola, Arkansas, City of Prescott, Arkansas, City of West Memphis, Arkansas, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative, Inc.

to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct.

Customers also allege several other grounds in support of its motion to reject. Firstly, Customers argue that by filing a split test year ending July 31, 1973, APLC has effectively understated its revenues. Secondly, Customers argue that certain factors utilized by APLC in construction of its cost of service are questionable; e.g., the utilization of a single peak allocation for its basis demand allocation. Thirdly, Customers argue that allowance of the nuclear adjustment clause would put the nuclear plant in its rate base while continuing to book interest during construction, since it does not anticipate putting the nuclear plant into operation prior to Spring, 1974. Fourthly, the Customers argue that the introduction of an embedded debt cost adjustment provision and a tax adjustment clause should be rejected as not meeting the justification for escalation factors set for in Commission's Opinion 633, *New England Power Company* (Docket No. E-7541) and if not rejected, should not be allowed to operate automatically. Fifthly, the Customers state that allowance of APLC's "additional facilities charge" would allow APLC to recover twice for all future line extension-recovery once by the "additional facilities charge" and secondly, recovery would be had in the increase cost of service.

In the event that the filing is not rejected, Customers urge the Commission to suspend the proposed rate schedule changes for the full five month statutory period provided for in Section 205(e) of the Federal Power Act, set the matter for hearing and request permission to intervene in these proceedings. Customers' motion to reject raises substantive issues which cannot be summarily decided and require an evidentiary hearing which we have set forth herein.

On review of APLC's June 1, 1973, filing at Docket No. E-8250 and Customers' motion to reject or in the alternative suspend the filing indicates that the proposed rates have not been shown to be just and reasonable and may be unjust, unreasonable, preferential or unduly discriminatory or otherwise unlawful and may require a full evidentiary hearing.

On March 8, 1973, APLC tendered for filing in Docket No. E-8071, an initial Power Service Agreement between the City Water and Light Plant of the City of Jonesboro, Arkansas (Jonesboro) and APLC to become effective June 1, 1973.

APLC described the Agreement as lasting for a term of at least seven years, beginning on or about June 1, 1973, and providing for an initial block of at least 5,000 KW during the term of the Agreement. Jonesboro is not now served by APLC and there is no interconnection between their respective systems. APLC states that the city electrical system has need of additional firm capacity and energy to supplement its own generation and other sources of firm power supply in order to adequately supply the city's customers. APLC further states that the rates and charges provided for in the Agreement were arrived at through negotiations with Jonesboro, and they are designed to produce a return approximately equal to the Company's overall rate of return.

The Agreement provides that the demand charge shall be increased by one cent ($.01) per KW of Contract Demand for each full one tenth of one percent (0.1%) increase in the Company's embedded cost of long-term debt above the 5.87% existing as of July 31, 1972. Furthermore, the energy charge will be increased or decreased to reflect the nearest one-thousandth (.001) mill per kilowatt-hour, the change in the cost of fuel utilized in Company-owned generating stations.

APLC's filing in Docket No. E-8071 was noticed on March 22, 1973 with motions of protest or intervention due on or before April 12, 1973. No motions to protest or intervene were received.

APLC's March 8, 1973, filing at Docket No. E-8071 became effective June 1, 1973. Our review indicates that the rates have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, preferential or otherwise unlawful. Therefore, we shall institute an investigation under Section 206 of the Federal Power Act to determine the justness and reasonableness of those rates.

We note that in a related case in Docket No. E-8142, the Commission in an order issued July 3, 1973, instituted an investigation under Section 206 of the Federal Power Act with respect to an embedded debt cost adjustment provision contained in the Power Coordination, Interchange and Transmission Agreement dated April 20, 1972 between APLC and Arkansas Electric Cooperative Corporation. Since the adjustment clause in Docket No. E-8142 is identical to the provision in Docket No. E-8250 and Docket No. E-8071, common issues of law and fact are raised. We will accordingly order consolidation of these dockets. Consistent with this action, we will amend our order of July 3, 1973, in Docket No. E-8142 to provide dates for service of evidence and hearing consistent with our action herein.

The Commission finds:

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates and charges contained in APLC's Rate Schedules as proposed in Docket No. E-8250 filed May 31, 1973.

(2) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Federal Power Act that the Commission enter upon a hearing under Section 206 of the Federal Power Act to determine the justness and reasonableness of the Initial Power Service Agreement in Docket No. E-8071 filed March 8, 1973.

(3) The disposition of this proceeding, should be expedited in accordance with the procedures set below.

(4) In the event this proceeding is not concluded prior to the termination of the suspension period herein ordered in Docket No. E-8250 the placing of the rate and charges applied for in this proceeding into effect, subject to refund with interest, while pending Commission determination as to their justness and reasonableness, is consistent with the purpose of the Economic Stabilization Act of 1970, as amended.

(5) Good cause exists for consolidation of Docket Nos. E-8250, E-8142, and E-8071.

(6) Consistent with our action consolidating Docket Nos. E-8250, E-8071 and E-8142, the procedural dates set forth in our July 3, 1973, order in the latter docket should be amended as hereinafter ordered.

(7) The petition to intervene of Customers should be granted as hereinafter ordered.

(8) The petition to reject in Docket No. E-8250 should be denied.

The Commission orders:

(A) The above enumerated rate schedules in Docket No. E-8250 filed May 31, 1973, are accepted for filing and their effectiveness is suspended until January 1, 1974.

(B) APLC is required in Docket No. E-8250 and in E-8071 to file within 60 days of the issuance of this order an updated cost of service for the twelve month test period ending June 30, 1973 (in accordance with Regulations 35.13 and 35.12 respectively).

(C) APLC's March 8, 1973 filing at Docket No. E-8071 constituting an initial Power Service Agreement with Jonesboro is hereby accepted for filing to become effective June 1, 1973 as requested.

(D) An investigation into the justness and reasonableness of the initial Power Service Agreement with Jonesboro at Docket No. E-8071 is hereby instituted under Section 206 of the Federal Power Act.

(E) Docket Nos. E-8250, E-8142 and E-8071 are hereby consolidated and set for hearing in accordance with the schedule established in ordering paragraph (F) hereof.

(F) Pursuant to the authority of the Federal Power Act, including Sections 205, 206, 308, and 309 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a public hearing shall be held commencing with a pre-hearing conference on February 5, 1974, at 10:00 A.M., EDT in a hearing room of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20424, concerning the lawfulness of the rate increase and adjustment clauses set forth above.

(G) On or before January 4, 1974, the Commission Staff shall serve its prepared testimony and exhibits. The prepared testimony and exhibits of any or all intervenors shall be served on or before January 15, 1974. Any rebuttal evidence by APLC shall be served on or before January 29, 1974. Cross-examination on the evidence filed will commence on February 12, 1974.

(H) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for the purpose (see Delegation of Authority, 13 C.F.R. 3.5(d)), shall preside at the hearing in this proceeding, and shall prescribe relevant procedural matters not herein provided, and shall control the proceeding in accordance with the policies expressed in the Commission's Rules of Practice and Procedure.

(I) The above-named petitioners are hereby permitted to intervene in this proceeding, subject to the rules and regulations of the Commission: *Provided, however*, that the participation of such intervenors shall be limited to matters affecting rights and interests specifically set forth in the respective petitions to intervene, except Customer's participation is limited to matters other than the alleged anti-competitive activities, and *Provided, further*, that the admission of such intervenors shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(J) Customer's motion to reject in Docket No. E-8250 is denied.

(K) Nothing contained in this order shall relieve the Applicant of any responsibility imposed by the Economic Stabilization Act of 1970, (Public Gas 91-370, 84 Stat. 799, as amended by Public Law 92-15, 85 Stat. 38), or by any Executive Order or rules and regulations promulgated pursuant to such Act.

(L) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission:

[SEAL]

MARY B. KIDD,
Acting Secretary.

ATTACHMENT
1 of 3

Designations and Descriptions
Arkansas Power and Light

Dated:

Filed: June 1, 1973

Effective:

FPC Designation	Customer	Description
Supplement No. 5 to Rate Schedule FPC No. 45 (Supersedes Supplement No. 2 to Rate Schedule FPC No. 45)	Farmers Electric Cooperative Corporation	Rate Schedule B1
Supplement No. 1 to Supplement No. 5 to Rate Schedule FPC No. 45	"	Service Regulation
Supplement No. 2 to Rate Schedule FPC No. 49	North Little Rock	Rate Schedule U3
Supplement No. 1 to Supplement No. 2 to Rate Schedule FPC No. 49	"	Service Regulation
Supplement No. 1 to Rate Schedule FPC No. 50	Hope	Rate Schedule U3
Supplement No. 1 to Supplement No. 1 to Rate Schedule FPC No. 50	"	Service Regulation

ATTACHMENT
2 of 3

Supplement No. 1 to Rate Schedule FPC No. 51	Citizens Light & Power Company	Rate Schedule U3
Supplement No. 3 to Rate Schedule FPC No. 55	West Memphis	Rate Schedule U3
Supplement No. 1 to Supplement No. 3 to Rate Schedule FPC No. 55	"	Service Regulation

FPC Designation	Customer	Description
Supplement 1 to Rate Schedule FPC No. 56	Prescott	Rate Schedule U3
Supplement No. 1 to Supplement No. 1 to Rate Schedule FPC No. 56	"	Service Regulation
Supplement No. 3 to Rate Schedule FPC No. 57	Conway Corporation	Rate Schedule
Supplement No. 1 to Supplement No. 3 to Rate Schedule FPC No. 57	"	Service Regulation
Supplement No. 2 to Rate Schedule FPC No. 60	Benton	Rate Schedule
Supplement No. 1 to Rate Schedule FPC No. 62	North Arkansas Electric Corporation	Rate Schedule B1

ATTACHMENT
3 of 3

Supplement No. 4 to Rate Schedule FPC No. 63 (Supersedes Supplement No. 1 to Rate Schedule FPC No. 63)	Osceola	Rate Schedule U3
Supplement No. 1 to Supplement No. 4 to Rate Schedule FPC No. 63	"	Service Regulation
Supplement No. 4 to	Mississippi County Electric Cooperative, Inc.	Rate Schedule
Rate Schedule FPC No. 65		B1
Supplement No. 1 to Supplement No. 4 to Rate Schedule FPC No. 65		Service Regulation

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. E-8250, et al.

ARKANSAS POWER AND LIGHT COMPANY

AMENDED PETITION OF PUBLICLY OWNED WHOLESALE CUSTOMERS

By order of July 31, 1973, this Commission suspended the proposed tariff increase of Arkansas Power and Light Company ("AP&L") in Docket E-8250, and admitted the undersigned publicly owned wholesale customers as parties to this proceeding. At page two of its order, this Commission stated:

> "By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anti-competitive issues. These standards are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anti-competitive activities. This action is without prejudice to Customers' right to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct."

We understand this language to mean that the Commission accepts 1) the specification of "facts relied upon" in the original Petition, 2) the specification of "the anti-competitive practices challenged" relied upon in the original Petition, but requests the petitioners to specify more clearly "3) the requested relief which is within this Com-

mission's authority to direct." In response to that portion of the Commission's order, the publicly owned wholesale customers hereby amend their petition to clarify their request that the Commission reduce the rate sought by AP&L to eliminate the price squeeze as follows:

1. Petitioners incorporate by reference in its entirety their Protest, Motion to Reject, and Petition to Intervene of Publicly Owned Wholesale Customers.

2. As Petitioners have demonstrated, this rate increase filing appears to be an attempt to institute a "price squeeze" to the end of putting Petitioners out of business as independent members of the electric power industry. In addition, as we have shown, the rate at which AP&L proposes to charge Petitioners is unduly discriminatory vis-a-vis the Company's retail industrial rates, which have historically been on a basis similarly structured, but somewhat higher than the wholesale for resale rates of AP&L. As this Commission properly advised the Supreme Court in *Gulf States Utilities Company* v. *FPC, et al.*, No. 71-1178, in its brief in that proceeding at page 13-14, "allegations of anticompetitive conduct would be properly raised and fully considered by the Commission in proceedings . . . to review rates under Sections 205 and 206. . . ." and, as the Supreme Court pointed out in its opinion, U.S. —, at pages 10-11 of the slip opinion,

> "Title II certainly did not preclude the operation of the anti-trust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. . . . This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to . . . directives contained in §§ 205, 206. . . . The Act did not render anti-trust policy irrelevant to the Commission's regulation of the electric power industry."

Whatever else the language may mean, there can be no question that it directs this Commission to eliminate rate structures which are anticompetitive by reason of a price squeeze.

In these circumstances, and without waiving any other relief heretofore sought, Petitioners request this Commission to reduce the proposed rates filed by AP&L to eliminate the anti-competitive price squeeze, within its authority under Sections 205 and 206.

Respectfully submitted,

/s/ Robert C. McDiarmid
ROBERT C. MCDIARMID
Attorney for the Conway Corporation, Benton Municipal Light & Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corp. and Mississippi County Electric Cooperative, Inc., Arkansas

August 22, 1973

Law Offices of:

Spiegel & McDiarmid
2600 Virginia Ave., NW
Washington, D.C. 20037

VERIFICATION

DISTRICT OF COLUMBIA, ss:

Robert C. McDiarmid, first being duly placed upon affirmation, deposes and says that he is an attorney for Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas; and that as such he has signed the foregoing Amended Petition of Publicly Owned Wholesale Customers for and on behalf of said parties; that he is authorized by the Cities and Cooperatives so to do; that he has read said Amended Petition and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information or belief.

/s/ Robert C. McDiarmid
ROBERT C. MCDIARMID

Subscribed and affirmed to before me this 22nd day of August, 1973.

/s/ Nancy S. Bartman
Notary Public

My Commission expires September 30, 1974.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Rush Moody, Jr., and
William L. Springer.

Docket Nos. E-8250
E-8142
E-8071

ARKANSAS POWER AND LIGHT COMPANY

ORDER AMENDING PRIOR ORDER

(Issued August 29, 1973)

On August 7, 1973, Arkansas Power and Light Company (APLC) filed a Motion for Clarification of the Commission's Order of July 3, 1973, in Docket No. E-8142 and of July 31, 1973, in the above-captioned consolidated dockets.

In its motion APLC states that in Ordering Paragraph (C) of the Commission's Order Accepting Proposed Rate Increase for Filing and Instituting Investigation of Debt Adjustment Provision Under Section 206 of the Federal Power Act, issued July 3, 1973, in Docket No. E-8142, the Commission directed APLC to file its prepared testimony and exhibits in that docket by September 4, 1973. In its Order of July 31, 1973, the Commission consolidated Docket No. E-8142 with Docket Nos. E-8250 and E-8071 and stated in Finding Paragraph (6) the procedural dates in the July 3, 1973, Order "should be amended as hereinafter ordered." In Ordering Paragraph (B) of the July 31, 1973, Order, the Commission required APLC to file an updated cost of service in Docket Nos. E-8250 and E-8071 within 60 days of the issuance of the order. In its motion of August 2, 1973, APLC asks whether the service of evidence by Company and Staff in Docket No. E-8142 will be the same schedule as established in Docket Nos. E-8071 and

E-8250 and therefore, APLC's direct evidence in Docket No. E-8142 would be due at the same time as its updated cost of service is to be filed.

As hereinafter stated, the Commission finds that APLC's direct evidence in Docket No. E-8142 should be filed on October 1, 1973, the same due date for its updated cost of service in Docket Nos. E-8250 and E-8071.

The Commission finds:

Good cause exists to amend the Commission Order of July 31, 1973, to provide for APLC's direct evidence in Docket No. E-8142 to be served on October 1, 1973.

The Commission orders:

(A) The Commission Order of July 31, 1973, is hereinafter amended to provide for APLC's service of direct evidence on October 1, 1973, in Docket No. E-8142.

(B) Staff's evidence in Docket Nos. E-8250 and E-8071 shall be served in accordance with the procedural dates set forth in the order of July 31, 1973. Staff's evidence in Docket No. E-8142 shall be served on January 4, 1974.

(C) APLC's motion for clarification is hereby granted.

(D) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket Nos. E-8250, E-8071, E-8142

ARKANSAS POWER & LIGHT COMPANY

RESPONSE OF ARKANSAS POWER & LIGHT COMPANY TO AMENDED PETITION OF PUBLICALLY OWNED WHOLESALE CUSTOMERS

Comes now Arkansas Power & Light Company (AP&L or Company), in accordance with Section 1.8(e) of the Commission's Rules of Practice and Procedure, for the purpose of responding to the "Amended Petition of Publically Owned Wholesale Customers," dated August 22, 1973, and filed in the above-referenced consolidated dockets. In support hereof, AP&L states:

1. By Order issued July 31, 1973, in the above-referenced dockets, the Commission, *inter alia*, accepted for filing and suspended until January 1, 1974 AP&L's proposed Rate Schedules U3 and B1, set the matter for hearing and permitted the intervention of certain of the Company's publically owned wholesale customers * (Customers). With regard to that intervention, the Commission stated:

> "By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anti-competitive issues. These standards are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anti-competitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review

* Conway Corporation, Benton Municipal Light & Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anti-competitive activities. This action is without prejudice to Customers' right to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct." (July 31 Order, p. 2)

2. On August 22, 1973, Customers filed an amended petition to intervene, wherein they stated:

> "We understand this language to mean that the Commission accepts 1) the specification of 'facts relied upon' in the original Petition, 2) the specification of 'the anti-competitive practices challenged' relied upon in the original Petition, but requests the petitioners to specify more clearly '3) the requested relief which is within this Commission's authority to direct.'" (Amended petition, pp. 1-2)

Customers then go on to request that the Commission "reduce the proposed rates filed by AP&L to eliminate the anti-competitive price squeeze, within its authority under Sections 205 and 206." (Amended petition, p. 3)

3. AP&L asserts that Customers have misinterpreted the Commission's July 31, 1973 Order in that the Commission could not have accepted the "specification of facts relied upon" in Customers' petition to intervene, since Customers did not state any facts in their original or amended petitions to intervene. Rather, they merely pleaded conclusions, such as "this rate increase filing appears to be an attempt to institute a 'price squeeze' to the end of putting Petitioners out of business as independent members of the electric power industry." (Amended petition, p. 2)

3. Customers' allegations of a "price squeeze" are totally unsupported by any facts or evidence. Since the Company knows of no anti-competitive practices in which

it has engaged, it is unable to respond to Customers' baseless conclusions with respect to a "price squeeze."

4. The Company therefore respectfully requests this Commission to treat Customers' allegations as a complaint under Section 306 of the Federal Power Act and require them to conform to the requirements of Section 1.6(b) of the Commission's Rules of Practice and Procedure with regard thereto. To wit, the complaint is required to contain "a statement of the facts forming the basis for the conclusion that there has been a violation of an act administered by this Commission or of a rule, regulation, or order issued by the Commission."

When Customers have filed such a complaint, containing *facts*, not merely conclusions, and have presented any documents which they believe support those facts, the Company will be in a position to rebut Customers' contentions.

5. AP&L asserts most emphatically that it has not engaged in any anti-competitive practices of any nature, and it is confident that the Customers will not be able to present any facts regarding such practices.

WHEREFORE, for the foregoing reasons, AP&L respectfully requests that the Commission dismiss the Amended Petition or, in the alternative, direct Customers to file, if they so desire, a complaint conforming to Section 1.6 of the Commission's Rules of Practice and Procedure.

Respectfully submitted,

ARKANSAS POWER & LIGHT COMPANY

By /s/ Robert T. Hall, III
HARRY A. POTH, JR.
ROBERT T. HALL, III
Reid & Priest
1701 K Street, N.W.
Washington, D.C. 20006

September 6, 1973

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

WHOLESALE ELECTRIC RATES—
Denial of Rehearing

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr.,
Rush Moody, Jr., and
William L. Springer.

Docket Nos. E-8250, E-8071, E-8142

ARKANSAS POWER AND LIGHT COMPANY

ORDER DENYING AMENDED PETITION TO INTERVENE AND CLARIFYING PRIOR ORDER

(Issued October 29, 1973)

On July 31, 1973, we issued an order in this proceeding which granted a certain petition to intervene [1] filed June 28, 1973, with the condition that the participation of the intervenors would be limited to matters other than the anti-competitive activities alleged. Relying on our decision in *Indiana and Michigan Electric Company* (I&M) order, Docket No. E-7740 issued on May 31, 1973, we found that said petition failed to specify the relief which was within the Commission's authority to grant. We permitted petitioner, however, the right to file an amended petition which would set forth the relief for the alleged anti-competitive conduct that is within this Commission's authority to grant.

On August 22, 1973, petitioners filed an amended petition reciting arguments and statements similar to those made in its initial petition to intervene. Specifically,

[1] Parties included in the joint petition are as follows: Conway Corporation, Benton Municipal Light and Water Works, Hope Water and Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

petitioners alleged that APLC's proposed rates is unduly discriminatory vis-a-vis the Company's retail industrial rates. The specific relief petitioners seek in the context of the proceeding is "that the Commission reduce the rate sought by APLC to eliminate the price squeeze . . ."

The relief sought by Peitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable. APLC has submitted its full evidentiary presentation including a cost of service as well as testimony and exhibits of their witnesses which they state support the subject wholesale rate increase. That evidence, including APLC's allocation of its costs to its wholesale service, is, of course, subject to review and cross-examination by all parties including the intervenors and is also of course subject to review and decision thereon by the Presiding Trial Judge assigned to the case as well as the Commission itself.

Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates. However, APLC's industrial rate level and the accounting and rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commission. We have no jurisdiction over APLC's industrial rates, and we do not choose to open this hearing to an examination of those rates. Such an action would require a detailed analysis of APLC's retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.

Petitioners' allegation of "price squeeze" in and of itself, does not constitute anticompetitive behavior by APLC given the fact that any wholesale rates we approve must be based on allocated wholesale costs. To approve rates which recover less than those costs would produce grave consequences, since such action would be tantamount to imposing confiscatory rates on APLC and possible subsidization of APLC's wholesale service by

APLC's industrial customers or other retail customers of APLC over whom we have no jurisdiction. Moreover, Petitioners' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the state commission.

Customers' amended petition cites language in *Gulf States Utilities Co.* v. *F.P.C.*, et al.,[2] which it asserts directs the Commission to eliminate rate structures which are anti-competitive by reason of a price squeeze. However, as we stated in our order in *Southern California Edison Company*, Docket No. E-8176, issued on September 21, 1973, the *Gulf States* opinion clearly states that its ruling is not to be interpreted as saying that the Commission must always hold a hearing on the antitrust issue.[3] The Supreme Court also noted without objection, that the Court of Appeals had observed that the summary disposition of the anti-trust argument in a proceeding might be acceptable provided such disposition does not go unexplained.[4]

Finally, petitioners state that they interpret the Commission's order of July 31, 1973, to mean that the Commission "accepts (1) the specification of 'facts relied upon' in the original Petition, and (2) the specification of the 'anti-competitive practices challenged' relied upon in the original Petition . . ." The facts relied upon by petitioners do not, in and of themselves, prove the validity of the matters asserted and if a full evidentiary hearing had been required on this issue, the facts relied upon would require further development.

The Commission finds:

(1) Based on our review of the filing by APLC, and the pleadings of the parties herein, we find that no anticompetitive issue has been presented which would require further development in this proceeding.

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[2] *Gulf States Utilities Co.* v. *F.P.C., et al*, 411 U.S. 747 at p. 758 (1973).

[3] *Ibid* at p. 762.

[4] *Ibid* at p. 762.

(2) We find the relief sought by the petitioners to be beyond the scope of this Commission's jurisdiction, contrary to the purposes of the Federal Power Act and inappropriate in this proceeding, the purpose of which is to review the justness and reasonableness of APLC's proposed wholesale rates.

The Commission orders:

The amended petition, filed by Customers, is hereby denied.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

[Filed No. 5, 1973, 3:36 PM, Office of the Secretary, Federal Power Commission]

Docket Nos. E-8250, E-8071, E-8142

ARKANSAS POWER & LIGHT COMPANY

PETITION FOR REHEARING

By Order of October 29, 1973 "Denying Amended Petition to Intervene and Clarifying Prior Order", this Commission appears to have determined that it will refuse to consider an intentional, voluntary, and conscious effort of a wholesale supplier of electric energy to 1) charge wholesale customers whose rates are set by this Commission substantially more than is charged retail customers with similar characteristics whose rates the company has voluntarily refused even to seek to increase, in violation of the antidiscrimination provisions of Sections 205(b) and 206(a) of the Federal Power Act, and 2) alter its historic wholesale-retail price structure in such a way as to preclude its wholesale customers from competing for new retail industrial load of the sort which is and historically has been vigorously sought by both the company and petitioners,* in violation of the Sherman and Clayton Acts. The customers, pursuant to Section 313(a) of the Federal Power Act, herewith seek rehearing of that Order, which, if adhered to, may seriously prejudice the presentation of their case and the end result thereof.

Thus it appears that this Commission, established, *inter alia*, to protect the small wholesale customers against the overwhelming economic might of the supplying electric utilities, is in large measure abdicating

* Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

its responsibility in this area.* Worse yet, the effect of this abdication is, in many ways, to place the wholesale customers is a far less protected position than if the Commission had never been given jurisdiction over wholesale rates.

Ordinarily, of course, there would be no question that a decision by an ordinary manufacturing company to charge so much to its wholesale customers that they could not compete with it at retail for a class of desirable customers would be illegal as a "price squeeze" under the antitrust laws. *United States of America* v. *Aluminum Company of America*, 148 F 2d 416 (2nd Cir., 1945). Further, it has been held as long ago as 1900 that, at common law, a utility is required to charge like rates for like service, and can justify a differential in rates only to the extent the services and costs thereunder are in fact different. In *Western Union Telegraph Co.*, v. *Call Publishing Co.*, 181 U.S. 92 (1901), the Court held, at 99-100:

> No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. . . . But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great

* The Order of October 29, 1973, infers protection to the customers because of the fact that wholesale rates are based on allocated wholesale cost. Of course, in *Duke Power Company*, —— FPC ——, this Commission appears to have taken leave of any historic anchor to cost in setting rates, and the estimated test year procedure established in Order No. 487, Docket R-463, gives very little hope to the customers that there will be any real cost data available upon which to base a rate.

> as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling.

See also *Postal Cable Telegraph Co.* v. *Cumberland Telephone & Telegraph Co.*, 177 Fed. 726 (MD Tenn, 1910); *North Carolina Public Service Co.* v. *Southern Power Co.*, 282 Fed. 837 (4th Cir. 1922). Thus, at common law, the wholesale customers here could have required AP&L to cost-justify any unfavorable difference in rates between them and the supplier's own retail industrial customers which would prevent their competition.

The basic question then, is whether the passage of the Federal Power Act, which imposed FPC jurisdiction on electric wholesale rates, removed these protections for the consumer-owned systems. As we shall demonstrate, the passage of the Act plainly did not remove these protections, but was intended to add thereto, especially in the light of the characteristic dual customer-competitor relationship to which the undersigned systems are subject.

The Commission has recognized this problem in earlier years. For example, in Hearings Before The Committee On Commerce, United States Senate, 89th Congress, 1st Sess. on S. 218 (Serial No. 89-38, 1965) at page 68, the then Chairman of the Federal Power Commission testified:

> To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industrial businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.

> The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers. In this respect wholesale rate regulation in the electric power industry is unique and faces far greater resistance by the privately-owned utilities than retail rate making. . . . The Nation values its pluralistic power economy and the role therein of the independent small-systems, public, cooperative, and investor owned. The necessity for Federal regulation to assure the survival of these small and medium-sized power systems is unmistakable.

The passage of Part II of the Federal Power Act plainly was not intended to override the protection which would otherwise be afforded by the antitrust laws. As the Supreme Court held in *Otter Tail Power Co.*, v. *US*, 410 US 366, 41 US LW 4292, 4295 (Feb. 22, 1973):

> There is nothing in the legislative history which reveals the purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

Thus, it is clear that the illegality of a price squeeze of this nature continues to exist.

Moreover, it is clear that the Commission has the responsibility to deal with the issue of price squeeze under its rate regulation pursuant to Sections 205 and 206 of the Act. As the Supreme Court noted, in *Gulf States Utilities Co.*, v. *FPC*, 411 US 747, 41 US LW 4637, at 4640, 4641, May 14, 1973):

> The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of selling and transmitting electric power in interstate commerce. . . . .

The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies. . . . .

In order to achieve Federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit. II was enacted. . . . Title II certainly did not preclude the operation of the antitrust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. See *Otter Tail Power Co.* v. *United States*, — U.S. — (1973); Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy 72 Col. L. Rev. 64 (1972). This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to . . . like directives contained in §§ 205, 206. . . . The Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry.

Moreover, the decision of the Supreme Court in *Gulf States supra*, is entirely consistent with the representation made to that Court by this Commission in its brief in that docket (brief for the Federal Power Commission in support of petitioner, Supreme Court Docket No. 71-1178). For example, at page 7 of that brief, this Commission represented that "in exercising its control over—rates, practices, and services of public utilities, the Commission has full authority to consider antitrust allegations and to prevent or remedy antitrust violations related to such matters." Further, this Commission, at page 13 of its brief, stated "allegations of anti-competitive conduct would be properly raised and fully considered by the Commission in proceedings—to review rates under Sections 205 and 206,—to review charges of unduly discriminatory rates or practices under Section 205—. Under each of these Sections the Commission has jurisdiction

to compel certain action by a public utility. If anticompetitive conduct or effects were established in such proceedings and were not outweighed by other factors which determine the public interest, the Commission could order a remedy directly related to the facts proven, e.g.,—order a change in rates, etc." And, at page 15, this Commission represented that "antitrust allegations can be relevant in proceedings—to approve—rates or practices of public utilities,—because monopolistic or discriminatory practices can be directly prevented or remedied in all these matters." See also, Commission brief at pages 12, 13, and 19. Thus, not only do the antitrust laws apply, outlawing the sort of price squeeze here alleged, but the Commission has correctly represented to the Court that it is required to enforce those laws in the course of its responsibilities under the Power Act.

Nor is there any serious question about the Commission's power to regulate wholesale rates by decreasing them to allow the wholesale customers fairly to compete with their suppliers for retail business. Section 205(b) of the Act reads:

> No public utility shall, with respect to any transmission or sales subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

This language would appear clearly to grant this Commission power to lower the wholesale rate subject to its jurisdiction in order to eliminate the unreasonable difference between classes of service here alleged.

If there were any question as to this Commission's ability so to act, it would have been resolved by the Supreme Court in its decision in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, 646-47 (1945) interpreting the analagous section of the Natural Gas Act, Section 5(a), 15 U.S.C. 717d(a):

> The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction. For Section 5(a), 15 U.S.C. 717d(a), provides that whenever the Commission 'shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential*, the Commission shall determine the just and reasonable rate.' (Italics added). It is clear that contracts covering direct industrial sales come within that italicized clause of Section 5(a).

This language does not appear susceptible of the interpretation placed upon that case in this Commission's order of November 2, 1973 in *Southern California Edison Co.*, Docket E-8176, at page 2.

There is here no suggestion that the retail rate in issue had been set in any way other than voluntarily by AP&L. Since there is apparently an intentional and substantial discrimination here, the rational apparently adopted by the Commission here would result in reopening, and indeed far expanding, the "Attleboro gap",* which Part II of the Act was passed completely to fill. *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 458 (1972). For if the Commission were correct, it would apparently remit wholesale customers to the state public service commissions to avoid the price squeeze by asking to have the lower industrial rate *raised*. Of course, there would be no reason why a state public service commission should ever act to raise a low industrial rate (which the state might well consider to be desirable for the purpose of attracting industry to the area).** We do not understand the view of the Commission that it has somehow, by non-use, lost its power to prevent discrimination. This is precisely the sort of "attractive gap" in regulation that the Supreme Court, in *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 20-22 (1961); and *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369-370 (1965) has determined Congress did not intend to leave in the passage of Part II of the Act.

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* Created by *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

** Arkansas, for example, seeks to attract industry, in part, on the basis of low retail electric rates.

This Commission has historically taken the position that charges under rates, even though set unlawfully high for illegal purposes, could not be recovered in private damage suits, treble damage or otherwise. See, e.g., this Commission's briefs to the Supreme Court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 US 346 (1951).* If this Commission is really stating, as appears to be the case, that it is removing any real remedy for the illegality charged, because it will continue to assert primary jurisdiction in any court proceedings brought to recover overcharges, but will itself refuse to consider illegal price squeezes of the sort alleged, then it ought plainly to say so, once and for all, so that the issue may be determined by the Courts or by Congress. We are unaware of any indication that Congress ever intended such a result.

In short, it is clear that the wholesale customers of AP&L would have been entitled to relief both under the antitrust laws and the common law applicable to utilities if their contentions as to the facts are correct; and it is clear as well that Congress, by the passage of Part II of the Act, intended to strengthen, rather than weaken, the protections of the wholesale customers against discrimination. The Commission's apparent abandonment of its duty to protect wholesale customers against discrimination would result in depriving these customers of protection they would have had prior to the passage of Part II, and is plainly in error.

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* We note that the Commission's argument in that case rested strongly upon an assumption that the ultimate consumers would not benefit from recovery. In the case of consumer owned systems, like the customers here, that would not be the case.

CONCLUSION

For the foregoing reasons, and for the reasons alleged in our pleadings to date, which are incorporated by reference herein,* the customers request this Commission to grant rehearing of its order of October 29, 1973; determine that the price squeeze issue is one over which this Commission has full jurisdiction; and direct the Presiding Administrative Law Judge to take such steps as may be necessary to eliminate the price squeeze as it may be shown to exist.

Respectfully submitted,

/s/ _____

ROBERT C. MCDIARMID

Attorney for the Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

November 5, 1973

Law Offices of:

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

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* Protest, Motion to Reject, etc., filed June 28, 1973, and corrected by motion of July 2, 1973, and Amended Petition filed August 22, 1973.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

WHOLESALE ELECTRIC RATES—Denial of Rehearing

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Docket Nos. E-8250
E-8142

ARKANSAS POWER AND LIGHT COMPANY

ORDER DENYING PETITION FOR REHEARING

(Issued December 5, 1973)

On November 5, 1973, a customer group [1] (Customers) of Arkansas Power and Light Company (APLC) filed a Petition For Rehearing of our order issued in this docket on October 29, 1973. In the October 29 order, we denied, *inter alia*, Customers' Amended Petition For Intervention and ruled that the antitrust allegations made by Customers therein would not be considered in the hearing ordered. Specifically, we found that no anticompetitive issue had been presented which required further development in an evidentiary hearing since the relief requested by Customers was ". . . beyond the scope of this Commission's jurisdiction, contrary to the purposes of the Federal Power Act and inappropriate in this proceeding, the purpose of which is to review the justness and reasonableness of APLC's proposed wholesale rates." [2]

Customers are in error in their allegation that our order is inconsistent with the Commission's position in the *Gulf*

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[1] Parties included in the petition are: Conway Corporation, Benton Municipal Light and Water Works, Hope Water and Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers' Electric Corporation and Mississippi County Electric Cooperative, Inc., Arkansas.

[2] *Arkansas Power and Light Company*, Docket Nos. E-8250, E-8071 and E-8142, Order issued October 29, 1973, page 4.

States case.[3] As indicated by Customers, we stated in *Gulf States* that a remedy might be provided for anticompetitive conduct in a rate case. However, the particular remedy sought by Customers in this proceeding is beyond the authority granted us by Section 205 and 206 of the Federal Power Act.

Customers refer us to the *Panhandle Eastern* case[4] which Customers maintain supports the proposition that the language of 205(b) of the Federal Power Act grants this Commission authority "to lower the wholesale rate subject to its jurisdiction in order to eliminate the unreasonable difference between classes of service here alleged." Customers also state that *Panhandle Eastern* is not susceptible to the interpretation placed upon that case by the Commission in an order issued November 2, 1973 in *Southern California Edison Co.*, Docket No. E-8176, at page 2.

We disagree with Customers' reading of the *Panhandle* case and reaffirm our interpretation as stated in our order issued November 2, 1973 in *Southern California*. As we stated in that order, "In *Panhandle Eastern*, the issue was the propriety of the Commission's determination of the proper allocation of costs to *Panhandle Eastern's* wholesale service." In ascertaining the costs associated with the wholesale service, this Commission was called upon to consider "what costs are fairly attributable to each business, wholesale and retail, and what the resultant rate for wholesale business should be."[5] As we indicated in our October 29, 1973 order in this docket, we fully intend to design wholesale rates which recover properly allocable wholesale costs. In the process of designing proper wholesale rates, we certainly will consider the cost responsibility of APLC's direct industrial service in determining cost properly allocable to APLC's wholesale service. This process of designing proper wholesale rates is, however, an entirely different matter from Customers' position that we must subordinate our jurisdiction to that of the state commissions by basing wholesale rates on retail rates.

[3] *Gulf States Utilities Co.*, v. *FPC*, 411 U.S. 747 (1973).

[4] *Panhandle Eastern Pipeline Co.*, v. *FPC*, 324 U.S. 635, 646-647 (1945).

[5] *Ibid.*, at 647.

We note that this Commission has not been reluctant to consider antitrust issues in rate cases in those instances where we have the statutory authority to provide relief. For instance, in *Carolina Power and Light Company*,[6] this Commission on its own motion instituted a proceeding under Section 206 of the Federal Power Act to investigate an Availability Clause in a wholesale rate tariff for sales to municipal customers with regard to the possible anticompetitive nature of such clauses.

Finally, we note that Customers' petition for rehearing seems to interpret our order of October 29, 1973 as barring all anticompetitive issues from consideration in this proceeding. While the Commission has denied the particular antitrust issues raised by Customers in this proceeding, this is not to say that antitrust issues which are the proper subject of this Commission's jurisdiction could not be considered if properly raised.

The Commission finds:

The Petition for Rehearing of Customers, filed November 5, 1973, raises no new facts or issues of law requiring a modification of our order issued in this docket on October 29, 1973.

The Commission orders:

The petition for Rehearing, filed by Customers on November 5, 1973, is hereby denied.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

[6] Docket No. E-7918, order issued on March 12, 1973.

SUPREME COURT OF THE UNITED STATES

No. 75-342

FEDERAL POWER COMMISSION,
Petitioner,

v.

CONWAY CORPORATION, ET AL.

ORDER ALLOWING CERTIORARI. Filed November 11, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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